Report prepared for the Governor and Legislature, pursuant to s.16.48(1)(b), Wisconsin Statutes

Unemployment Insurance Advisory Council Report

Covering Activities From November 2002

Through November 2004

Roberta Gassman, Secretary

Wisconsin Department of Workforce Development

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CONTENTS

Page

MEMBERSHIP OF THE UI ADVISORY COUNCIL

Management Representatives

James Buchen

Earl Gustafson

Edward J. Lump

Robert Oyler

Daniel Petersen

Labor Representatives

Michael Bolton

Red Platz

Robert W. Lyons

Phillip Neuenfeldt

Dennis Penkalski

Chair

Gregory A. Frigo

BIENNIAL REPORT

The Secretary of the Department of Workforce Development is required to report to the Governor and the legislative leadership every two years on the deliberations of the Council on Unemployment Insurance (Council). This report summarizes the deliberations and activities of the Council from November 2002 through November 2004. A report covering the activities of the Council from November 2000 through November 2002 was previously submitted. Copies of the previous report are available from the department.

BACKGROUND

For over 60 years, modifications in the Unemployment Insurance (UI) Law have been a direct result of continuing efforts on the part of the Council and the legislature. The Council has a threefold statutory responsibility. First, the Council is to act as an advisor to the Department of Workforce Development (Department) in its administration of the UI law. Second, the Council is to report its views on pending legislation relating to UI to the appropriate committees of the legislature. Third, the Council is to submit its recommended changes in the UI law to each session of the legislature.

Law changes recommended by the Council to the legislature result from negotiations between management and labor members. The Council studies potential law changes on an ongoing basis; however, it is rare for the Council to approve suggested changes on a piecemeal basis. Rather, a total package of changes is negotiated. This approach helps ensure the recommended package will represent a balance of interests between management and labor. It also helps management and labor prioritize their recommendations, rather than accepting a suggestion simply because it was raised early in the legislative floor period.

Traditionally, the legislature has given great weight to the Council's recommended changes in UI law. This support of the Council process has helped ensure the continuing conformity of Wisconsin's UI law with federal requirements. Conformity is important because it allows Wisconsin employers to pay a substantially lower federal unemployment tax (FUTA). In 2004, Wisconsin employers would

have paid about $988 million in additional federal taxes if Wisconsin's UI law had not been in conformity with the federal law. Conformity also ensures that Wisconsin receives the federal funding necessary to administer the UI program. Wisconsin's 2004 entitlement was about $65 million.

The legislature has also traditionally recognized the value of the Council process in bringing together into a single body the two groups most affected by the UI program, labor and management. The Council addresses controversial issues and attempts to resolve them to mutual satisfaction by balancing the cost of taxes to employers and the benefits paid to employees. The legislation recommended reflects the Council's concerns about the solvency of the unemployment fund, as well as the interests of those who pay for the program and those who receive its benefits.

The Council recognizes that it has an ongoing duty to communicate with the legislature on the status of deliberations, and about specific issues raised by members of the legislature. To help fulfill this communication responsibility, the Council sends meeting agendas and minutes to all legislators. The Council also invites the chairs of the Senate and Assembly labor committees to attend its meetings and to provide input to the Council on matters of interest

MEMBERSHIP

By statute, the 11-person Council consists of five members representing employers (management), including one member who specifically represents small businesses; five members representing employees (labor); and a nonvoting chairperson who is a permanent classified employee of the Department. Voting Council members are appointed by the Secretary of the Department of Workforce Development to serve staggered 6-year terms. The Chair is appointed by the Secretary to serve as long as the Secretary desires. There has been no change in the membership of the council since the last report.

The voting Council members, their affiliation and the dates their terms expire are noted below.

Employer Representatives

James Buchen, Vice President/Government Relations, Wisconsin Manufacturers and Commerce Association, Madison, WI: term expires July 1, 2009.

Earl Gustafson, Energy and Projects Manager, Wisconsin Paper Council, Neenah, WI: term expires July 1, 2007.

Edward J. Lump, President and CEO, Wisconsin Restaurant Association, Madison, WI: term expires July 1, 2005 (Small Business Representative)

Robert Oyler, President, Capital City Harley-Davidson and The Employer Group, Inc, Madison WI: term expires July 1, 2005.

Daniel Peterson, Vice President of Finance, J.H. Findorff & Sons, Inc., Madison, WI: term expired July 1, 2003, and he continues to serve.

Employee Representatives

Michael Bolton, International Representative, United Paperworkers International Union, Plover, WI: term expires July 1, 2007.

Robert W. Lyons, Executive Director, Council 40, American Federation of State, County and Municipal Employees (retired), Madison, WI: term expired July 1, 2003, and he continues to serve.

Phillip Neuenfeldt, Secretary/Treasurer, Wisconsin State AFL-CIO, Milwaukee, WI: term expires July 1, 2009.

Dennis Penkalski, Business Manager, Milwaukee & Southeast District Council of Carpenters (retired), Milwaukee, WI: term expires July 1, 2005.

Red Platz, Sub Regional Director, United Auto Workers Region 4, Oak Creek, WI: term expires July 1, 2007.

PROCEDURES

Business Meetings

The Council generally meets every five to six weeks. Meeting agendas are mailed to Council members about one week prior to the meeting. The Council accepts, at any time, written comments and suggestions about the UI law from legislators, employers, employees and the general public. Oral presentations at Council meetings are allowed at the Council's discretion. Council meetings are tape-recorded and summaries of each meeting are prepared. The Council met 20 times during this reporting period.

The Council votes on motions made and seconded. By law, seven votes out of ten are required for the Council to approve proposed law changes. A record is kept of all votes.

When correspondence to the Council is received, the Chair sends a response advising the writer that the letter will be shared with the Council. Each Council member is provided with a copy of such correspondence. Each letter is listed on the agenda as a discussion item. This provides a formal opportunity for the Council to address the suggestion and to request further study by the Department. Interim letters are sent to law change suggestors informing them of the Council's action regarding their proposal. Once the Council has decided upon a law-change package to recommend to the legislature, the Department informs letter writers of the final action taken by the Council.

The Council uses a standardized format for analysis of suggested law changes. The analysis, which is prepared by the Department, includes a description of the suggested law change, the reasons for it, the history and background of any current provision, any federal or state law issues relevant to the proposal, the policy and fiscal effects of the proposed change, and the administrative feasibility and impact of the proposal.

Council meetings are subject to the Open Meetings Law and advance public notice of each meeting is provided. The Open Meetings Law does, however, provide an exemption for the Council, which allows labor and management to hold separate closed caucuses to discuss potential law changes.

Public Hearings

The Council held the following public hearings during this reporting period:

Madison	April 1, 2004
Pewaukee	May 5, 2004
Appleton	August 17, 2004
Wausau	September 16, 2004

ISSUES RESOLVED IN THIS REPORTING PERIOD

The Council receives numerous suggestions for changes in the UI law from the Department, legislators, employers, employees and others concerned about the UI program. The Council selects proposed law changes for Department analysis and further consideration. The following is a synopsis of the proposed law changes which were adopted by the Council, recommended to the legislature and enacted by 2003 Wisconsin Act 197.

Major provisions of 2003 Wisconsin Act 197

Benefits

Temporarily lift benefit suspensions during approved training.

A Court of Appeals decision required that the department temporarily lift both the suspension of benefits and the imposition of re-qualifying requirements when a claimant enters training for dislocated workers covered by the Workforce Investment Act. When the training is completed, the department re-imposes the suspensions and re-qualifying requirements if any are still outstanding.

Act 197 codifies the Court of Appeals decision. To avoid repeated litigation on the same basic issue in a variety of situations that differ slightly in their particulars, Act 197 also extends the lifting and re-imposition of suspensions to similar, closely related but less frequent situations involving approved training.

Allow claimants to leave suitable work and receive benefits when training commences under the Trade Readjustment Act (TRA).

When substantial numbers of workers in a given industry are laid off due to competition from imports, they may be given opportunities to receive training funded by the federal government. Some find other work while they are waiting for the training to start or waiting to receive federal training funds. If such individuals quit suitable work when the training started, they could have been disqualified under prior law. Under Act 197, the individual is allowed benefits while in training.

Charge the balancing account for benefits paid during the temporary lift of suspensions described in the two above changes.

Act 197 transfers benefit charges from employer accounts to the balancing account for claimants whose disqualifications are suspended while participating in approved training. The Act transfers charges only with respect to benefits paid after the department issues a formal decision under applicable sections of law for the changes listed immediately above.

Limit benefit disqualification's during certain training courses authorized by the Department of Workforce Development.

Prior law did not consider training programs authorized by the Department of Workforce Development for unemployed workers as approved training if the training was part time. Act 197 protects claimants from being disqualified when their participation is authorized by the department in either full or part time training programs currently available and not designed for primary and secondary school students under 18 years of age.

Clarify statutory language that applies only to dislocated workers.

Prior state law on approved training for dislocated workers cited a federal law that authorized training for a wide variety of workers. The intent of the Wisconsin law is that it applies only to dislocated workers. The change makes it clear that Wisconsin law on approved training for dislocated workers applies only to dislocated workers, not other groups of workers mentioned in the cited federal law.

Clarify statutory language to prevent possible program abuse.

Act 197 clarifies language in the approved training statutes to assure that no one may use this section of the law to claim benefits while refusing to provide the department with a social security number. Although it is unlikely this would happen, the former law was written in such a way that it could happen.

Make permanent the requirement that individuals claiming unemployment benefits must engage in at least two activities each week to help them find work.

Prior to 1999, the law required that claimants perform one job seeking activity in each week they claimed unemployment benefits. Act 15 in 1999 initiated a trial for two years during which claimants had to engage in two or more job seeking activities each week. Act 197 makes the two work search actions per week permanent for claimants who are not returning to the employers that laid them off.

Remove the 12-week limit on the work search waiver for workers who have a history of returning to the same employer.

Some employers in the state have a history of laying off workers temporarily while they wait for new orders or supplies to arrive. They are unable to give their workers a specific date for returning to work.

Prior to Act 197, the department could provide a claimant with a work search waiver when there was a specific return date or a reasonable expectation of reemployment with the same employer within the next 12 weeks. If reemployment was going to be more than 12 weeks away, the claimant had to ask the department to consider a longer waiver. Then the department would investigate the circumstances with the employer and make a decision on whether to extend the waiver. Many claimants were not aware of what they had to do to obtain the longer waiver from the department.

Act 197 makes it easier for a claimant to obtain a work search waiver if the claimant reports a history of returning to work for the same employer. In such cases, the department will request that the claimant's employer verify the claimant's employment status and shall consider the employer's history of layoffs and reemployment in determining whether the claimant's work search will be waived.

Administrative Rules

Remove requirements for administrative rules on labor disputes and absenteeism.

The Unemployment Insurance Advisory Council recommended including in 2001 Act 35 a review of labor disputes and absenteeism and, pending completion of that review, development of administrative rules. After further consideration, the Council agreed that alternative approaches would better serve their needs and recommended removing the requirements to create rules. Act 197 removed the requirements created under 2001 Act 35 that directed the department to develop and implement the following administrative rules related to benefits:

Establish misconduct standards for repeated absences or tardiness resulting in disqualifying claimants from unemployment benefits

Specify what constitutes an establishment for the purposes of disqualifying a claimant from unemployment benefits during a labor dispute

Taxes and Employer Status

Restore partial successorship provisions in effect prior to 2001 Wisconsin Act 35.

2001 Wisconsin Act 35 made significant changes to the successorship provisions. However, shortly after this change, the department determined that the new provisions had undesired results. Therefore, Act 197 undoes these changes and reinstates the provisions in effect prior to Act 35.

Treat LLCs for unemployment tax and benefit purposes in accordance with the form of business organization (sole proprietorship, partnership, or corporation) elected for federal tax reporting purposes.

Over the years the department has seen an increase in the number of issues relating to the unemployment tax status and benefit eligibility of LLC members. As originally written, the statutes were inadequate for resolving many issues.

Federal tax law allows an LLC to elect to be treated as a sole proprietor, partnership or corporation for federal tax purposes. Prior UI law did not allow such elections, which caused confusion and reporting difficulties for Wisconsin LLCs. In general, the department will now treat a limited liability company for unemployment insurance tax and benefits purposes consistent with the manner in which the LLC is treated for federal tax purposes.

Establish treatment of limited liability companies (LLCs) and their shareholders for unemployment insurance purposes.

As a result of the above change, Act 197 also implemented various other changes designed to create consistency between the treatment of officers of corporations and owners of corporations and partnerships on the one hand and members and owners of LLCs on the other hand. These changes include:

- Definition of employment amended to include members of an LLC treated as a corporation who are principal officers with an ownership interest and who provide services to the employer.
- Adds an LLC treated as a corporation that meets the family ownership requirements to the definition of a family corporation.
- Adds individuals named as members of an LLC to the definition of "principal officer."
- Adds LLCs treated as corporations to and rewords the provision allowing employers to elect to exclude the services of their principal officers with a 25% or more ownership interest in the company.
- Adds an LLC treated as a corporation to the provision defining what constitutes a substantial ownership interest for the principal officer exclusion election provision.
- Adds an LLC treated as a partnership to the provision limiting the benefits of an individual providing services to a partnership in which at least 50% of the business is owned by a close family member(s) of that individual.
- Adds an LLC treated as a corporation to the provision limiting the benefits of an individual who provides service to a corporation in which at least ½ of the ownership interest is held by that individual's close family member(s)

- Adds an LLC treated as a corporation to the provision limiting the benefits of an individual who provides service to a corporation in which at least ¼ of the ownership interest is held by that individual.
- Clarifies that the provision applies to family corporations and adds language to cover LLCs.
- Includes an LLC treated as a corporation in the definition of a family corporation as used in that paragraph.
- Creates authority for the department to treat a member of an LLC as an employee if needed to prevent fraud.

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Make permanent the definition of employee that sunset in April 2004.

Prior to 2000, the definition of employee provided that an individual would be considered an employee for UI purposes unless it could be shown that one of two factors and seven of ten separate factors were met. Effective for the four year period beginning in April of 2000, the definition was changed to combine all ten factors into a single list and to provide that an individual would be considered an employee unless seven of the ten factors were met. These changes were designed to make it simpler for business to understand and to make it somewhat easier to meet the necessary number of factors to not be an employee.

The modified definition requiring compliance with any seven of the ten factors worked well for business and the department during the four year trial period. Therefore, Act 197 removes the sunset clause and the definition becomes permanent.

Program Administration

Extend offset procedures for benefits obtained through misrepresentation.

Prior law allowed the department to withhold current benefits due to offset benefits previously received through misrepresentation. The term “offset future benefits” has been changed to “recoup future benefits”.

The change updates the statutes to correspond to rulings in various bankruptcy courts around the country regarding applicability of the bankruptcy stay. When an individual files for bankruptcy, the Bankruptcy Code provides for an automatic prohibition of any debt collection action. Offsetting an overpayment against future benefits would require the department to go into court to get relief from this bankruptcy stay. However, several bankruptcy courts have allowed recovery of UI overpayments from future benefits when benefit fraud is involved. They do this by terming what is being done in that situation "recoupment" rather than "offset". The reasoning is that the recovery of the benefits is part of the same quasi-contractual transaction of claiming benefits as is the payment of future benefits. By changing the language, the department will be more able to use the reasoning of the bankruptcy courts to allow recovery of overpaid benefits which it might not otherwise be able to recover.

Extend the length of a levy until a debt is paid in full.

Since the UI levy law was enacted in 1989, the department has used it to collect delinquent unemployment insurance taxes and overpaid benefits by obtaining property of a debtor which is held by a third party, such as an employer, bank or insurance company. The levy is in effect until the debt is satisfied or one year passes from the date of issue, whichever comes first. Frequently, installment levies on wages must be extended beyond one year in order to assure repayment in full.

Under old law, when the department had to set up a new levy because the year ended, notices were sent to the debtor and the third party. Frequently, the notices caused confusion because the notice recipients thought they were being served with a levy for a second unrelated debt. The second levy caused telephone calls and additional paperwork for department staff and county courts. The department also had to pay a separate fee for each act of filing. The new law removes the phrase that limits the levy to one year. It leaves the levy in place until fully satisfied or released by the department.

Update the subsistence allowance exempt from levy.

To collect benefit overpayments after a claimant returns to work, the law allows the department to impose a levy on the debtor's wages. However, it also requires the department to exempt from the levy some or all of the debtor's earnings that may be needed for current living expenses.

New law exempts the greater of a weekly amount derived from the annual federal administrative poverty guideline for the debtor's household size or 80 percent of the debtor's disposable earnings for the week. Under Act 197 the department allows the debtor to retain somewhat more in wages and repay the debt more slowly. The department retains the discretion to impose a higher levy in cases of fraud. These changes were made to harmonize the UI levy statute with changes in the state garnishment statute.

Pay court fees more efficiently.

When needed, the department places a lien on the property of a debtor. Each lien results in two fees. The first, a filing fee, is charged when a warrant is issued to place the lien on the property. The second fee is a satisfaction fee paid when the entire debt is paid in full or the lien is otherwise released.

Under prior law each circuit court accumulated all of the filing fees for six months and billed the department semiannually. In contrast, each court billed the department immediately each time a satisfaction fee was due. This change allows the satisfaction fees to cumulate semiannually and be paid at one time like the initial fees to file a lien. This change makes the fee paying process more efficient for the department and the courts.

Maximize interest earned on the Unemployment Reserve Fund.

Under federal law states must deposit unemployment tax receipts in the federal Unemployment Trust Fund. States also contract with local banks to provide banking services like receiving tax deposits and writing weekly benefit checks for claimants. Typically, states pay for bank service fees from interest earned on the short term balances on deposit with the bank.

Because of current low interest rates on bank deposits compared to the federal trust fund rate, department staff realized the trust fund would earn more income if compensating balances in the local

bank were reduced. Act 197 authorizes the department to pay the bank service fees with federal funds available for administration of the unemployment insurance program. Because interest rates change, Act 197 also gives the department the option each quarter to pay for bank costs with either program administration funds or by maintaining compensating balances in a local bank account.

Each quarter the department will compare estimated earnings from the federal trust fund and the local bank account. It will then pay bank costs using the option that is estimated to result in the highest net interest earnings.

Finance the redesign and development of unemployment insurance information technology systems.

The information technology systems underlying unemployment insurance tax collections and benefit payments are more than 20 years old. In 1998 a project, now nearing completion, was initiated to redesign the tax system to provide better service to Wisconsin employers. At this time, changes are needed to the systems used in paying benefits and resolving disputes between employers and claimants.

Funds for upgrading the benefits and appeals systems come from several sources, including an administrative fee. This change extends for 4 years an administrative fee that will be assessed at one hundredth of one per cent of taxable wages. This fee will continue to be offset by an equal reduction in the employer's solvency tax rate. The fee is not charged to employers whose infrequent layoffs result in a zero solvency tax rate.

Provide an administrative method for collecting overpayments and penalties imposed on imposters.

In 1999, Act 15 allowed the department to set up overpayments and impose administrative penalties on any claimant who used the identity of another person to collect the other person's weekly unemployment benefits. However, the statute did not provide a means of collecting either the overpayment or the administrative penalty from the imposter other than referring each case to a district attorney. Act 197 makes overpayments to imposters and related penalties collectible not only

through referral to a district attorney but also by using the same administrative procedures used to collect other overpayments and penalties.

Technical Changes

Clarify the late appeals statute.

Former law did not specify the circumstances under which a hearing on a late appeal would be held. New law states that an administrative law judge may dismiss the appeal without a hearing if the reasons for being late, when considered most favorably to the appellant, were not beyond the party's control. Otherwise a hearing will be held.

Expand the definition of "child" to include stepchildren.

Formerly, unemployment law did not include stepchildren in the definition of "child". Act 197 includes stepchildren so that unemployment law applies equally to all children in a family unit.

Other Changes to the definition of an employee.

- Excluding owner of a sole proprietorship from the definition of an employee
- Excluding a partner in a partnership from the definition of an employee

These changes codify a longstanding interpretation that the owner of an unincorporated business is not an employee of his or her own business for UI purposes.

New definitions

Act 197 adds definitions for the terms "partnership" and "vocational training" as those terms are used for unemployment insurance purposes. These changes are necessitated by changes in the LLC statute and the approved training statute described elsewhere in this report.

Replace the word "an" in the educational employee statute with the word "any".

The educational employee statute denies unemployment benefits to school year employees during breaks and between school year terms when the employees have reasonable assurance of subsequent term employment. Former law used the word "an" employer when referring to future educational

employment. However, "an" was sometimes interpreted to mean that only employment with the former school year employer was reasonable assurance of future work. Replacing "an" with "any" reinforces the intention of federal law that future employment with any educational employer is reasonable assurance.

Modify wording of the Social Security pension offset change to conform to federal request.
The United States Department of Labor has requested additional wording in the statute exempting unemployment benefits from reduction when a claimant receives Social Security benefits. The department included this language in Act 197. There is no change in policy.

ISSUES PENDING RESOLUTION IN THIS REPORTING PERIOD

Pending Conformity Issues

The United States Department of Labor (DOL) has directed the department to change its interpretation of "new work" in applying labor standards provisions to work in the temporary employment industry. This arises under federal law requiring that state law cannot deny benefits if a claimant refuses "new work" for which the wages, hours or other conditions are "substantially less favorable than prevailing for similar work in the locality". Currently, as applied to temporary employment situations, the department is following the Wisconsin Court of Appeals decision in ***Cornwell Personnel Associates, Ltd. v. Linde***, 175 Wis. 2d 537, 499 N.W.2d 705 (Ct. App. 1993), which the DOL does not consider correct. The department and temporary help industry representatives have been meeting with the DOL national office to seek changes in DOL's interpretation. DOL is currently studying the issue.

Pending Administrative Rule Issues

In 2001 Act 35 the department was directed to promulgate an administrative rule to change the definition of "full time" employment for UI purposes from 35 hours per week to 32 hours per week. Subsequently, the Council was unable to agree on the content of another rule directive in

Act 35 regarding benefit disqualification based on tardiness and absence. As a result, the Council has put this rule on hold.